JAN 9 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-692

ROBERT BRUCE MOORE, JR.,

Petitioner,

-vs-

HAROLD CARDWELL, Warden,

Respondent.

RESPONSE TO PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WARNER LEE
The Attorney General

JOHN S. O'DOWD
Ass't Attorney General
415 West Congress
Tucson, Arizona

Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-692

ROBERT BRUCE MOORE, JR.,

Petitioner,

vs.

HAROLD CARDWELL, Warden,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

N. WARNER LEE
The Attorney General

JOHN S. O'DOWD
Ass't Attorney General
415 W. Congress
Tucson, Arizona

Attorney for Respondent

I N D E X

	Page
TABLE OF CASES AND AUTHORITIES . . .	ii,iii iv,v
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	
JURISDICTIONAL STATEMENT	
ARGUMENT	2
I	
PETITIONER'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED BY THE STATE TRIAL COURT	
CONCLUSION	11

TABLE OF CASES AND AUTHORITIES

Cases	Page
Brewster v. Swope 180 F.2d 984 (9th Cir. 1950)	8
Downum v. United States 372 U.S. 734 83 S.Ct. 1033 10 L.Ed.2d 100(1963)	3,9,11
Dreyer v. Illinois 187 U.S. 71 23 S.Ct. 28 47 L.Ed. 79 (1902)	4
Forsberg v. United States 351 F.2d 242 (9th Cir. 1965)	6
Gori v. United States 367 U.S. 364 81 S.Ct. 1523 6 L.Ed.2d 901 (1961)	4,9,11
Himmelfarb v. United States 175 F.2d 924 (9th Cir. 1949)	8
Howard v. United States 372 F.2d 294 (9th Cir. 1967)	6
Keerl v. Montana 213 U.S. 135 29 S.Ct. 469 53 L.Ed. 734 (1909)	4

TABLE OF CASES AND AUTHORITIES (Con'd)

Cases	Page
Illinois v. Somerville 410 U.S. 458 93 S.Ct. 1066 35 L.Ed.2d 425 (1973)	3,9,10,11
Logan v. United States 144 U.S. 263 12 S.Ct. 617 36 L.Ed. 429 (1892)	4
Lovato v. New Mexico 242 U.S. 199 37 S.Ct. 107 61 L.Ed. 244 (1916)	4
Moore v. Arizona 412 U.S. 906 93 S.Ct. 2292 36 L.Ed.2d 971 (1973)	2
Moore v. Cardwell No. Civ. 73-724 PHX. (WEC) (Order, filed Dec. 18,1973)	7
Oelke v. United States 389 F.2d 668 (9th Cir. 1967)	8
Simmons v. United States 142 U.S. 148 12 S.Ct. 171 35 L.Ed. 968 (1891)	4

TABLE OF CASES AND AUTHORITIES (Con'd)

Cases	Page
State v. Moore 108 Ariz. 532 502 P.2d 1351 (1972)	1
Thompson v. United States 155 U.S. 271 15 S.Ct. 73 39 L.Ed. 146 (1894)	4
Tolan v. United States 370 F.2d 799 (9th Cir. 1967)	6,8
United States v. Dinitz 492 F.2d 53 (5th Cir. 1974)	3
United States v. Goldstein 479 F.2d 1061 (2nd Cir. 1973)	7
United States v. Jorn 400 U.S. 470 91 S.Ct. 547 27 L.Ed.2d 543 (1971)	3,9,11
United States v. Lansdown 460 F.2d 164	6
United States v. Medansky 486 F.2d 807 (7th Cir. 1973)	5

TABLE OF CASES AND AUTHORITIES (Con'd)

Cases	Page
United States v. Moon 491 F.2d 1047 (5th Cir. 1974)	5
United States v. Perez 22 U.S. (9 Wheat.) 579 6 L.Ed. 165 (1824)	2,9
Wade v. Hunter 336 U.S. 684 69 S.Ct. 834 93 L.Ed. 974 (1949)	4,11

QUESTION PRESENTED

I. WAS PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM BEING TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE VIOLATED WHEN THE STATE TRIAL COURT DISMISSED THE DEADLOCKED JURY DURING PETITIONER'S FIRST TRIAL?

STATEMENT OF THE CASE
STATEMENT OF FACTS
JURISDICTIONAL STATEMENT

Respondent accepts Petitioner's Statement of the Case and Statement of Jurisdiction contained in his petition for certiorari. In addition, Respondent wishes to apprise the court that the decision of the Supreme Court of Arizona in State v. Moore, is reported at 108 Ariz. 532, 502 P.2d 1351 (1972), and this court's denial of Petitioner's Petition for a Writ of Certiorari in

Moore v. Arizona is reported at 412 U.S. 906, 93 S.Ct. 2292, 36 L.Ed.2d 971 (1973). Also, the U.S. Court of Appeals (9th Cir.) affirmed the judgment of the U.S. District Court in this cause on October 4, 1974. (Memorandum, Cause No. 74-1327).

ARGUMENT

I

PETITIONER'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED BY THE STATE TRIAL COURT.

As this court is well aware, the benchmark decision of this court in the area of double jeopardy is United States v. Perez, 22 U.S. (9 Wheat) 579, 6 L. Ed. 165 (1824). In that decision, this court stated:

> We think, that in all cases of this nature [where the jury was discharged after being unable to agree], the

> law has invested courts of justice with the authority to discharge a jury from giving any verdict, when, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated. Id. at 579, 6 L.Ed. at 165, emphasis added.
>
> Inspired by [this] language in Perez, subsequent cases have consistently applied this test on a case by case basis and refused to catalogue specifically the circumstances in which the declaration of a mistrial would be supported by "manifest necessity" or the "ends of public justice". United States v. Dinitz, 492 F.2d 53, 57 (5th Cir. 1974)

See Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); Downum v. United States, 372 U.S. 734,

83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949); Lovato v. New Mexico, 242 U.S. 199, 37 S.Ct. 107, 61 L.Ed. 244 (1916); Keerl v. Montana, 213 U.S. 135, 29 S.Ct. 469, 53 L.Ed. 734 (1909); Dreyer v. Illinois, 187 U.S. 71, 23S.Ct. 28, 47 L. Ed. 79 (1902); Thompson v. United States, 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894); Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892); Simmons v.United States, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891).

Perez, "does not speak in terms of a duty incumbent on the court, but characterizes the court's responsibility as an 'exercise [of] sound discretion' and

a 'power [which] ought to be used with the greatest caution'. The issue therefore is not whether the [trial] judge violated a duty in declaring a mistrial, but whether the court abused its discretion in exercising that power." United States v. Medansky, 486 F.2d 807, 811 (7th Cir. 1973).

> There is no mechanical formula to be applied, but rather the focus is upon the propriety of the trial judge's exercise of his discretion in granting the mistrial, taking into account all circumstances relevant to the particular trial. United States v. Moon, 491 F.2d 1047, 1049 (5th Cir. 1974).

There exists ample precedent, therefore, to support the trial court's ruling in this case that the jury's genuine inability to agree on a verdict constituded "manifest necessity" warranting

the declaration of a mistrial. See United States v. Lansdown, 460 F.2d 164, 166 (4th Cir. 1972); Howard v. United States, 372 F.2d 294 (9th Cir. 1967), cert.denied 388 U.S. 915, 87 S.Ct. 2129, 18 L.Ed.2d 1356 (1967); Tolan v. United States, 370 F.2d 799 (9th Cir. 1967), cert. denied 387 U.S. 932, 87 S.Ct. 2049, 18 L.Ed.2d 994 (1967); Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965), cert. denied 383 U.S. 950, 86 S.Ct. 1209, 16 L.Ed.2d 212 (1966).

> Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts. On this view of the case, the only question presented to us, therefore, is whether [the

> trial judge] abused his discretion in concluding when he did that the jury was in fact genuinely hung. United States v. Goldstein, 479 F.2d 1061, 1068 (2nd Cir. 1973).

Respondent submits that the Arizona trial court committed no error in declaring a mistrial of petitioner's first trial. As Judge Craig pointed out in his order dismissing the petition for a writ of habeas corpus, "the court was informed that the jury was still divided numerically as it had been the previous night, that the foreman felt a verdict was not probable, and that eleven jurors felt further deliberations would reap no results." Moore v. Cardwell, No. Civ. 73-724 PHX. (WEC) (Order, filed December 18, 1973).

It has pointed out many times that

a "defendant who pleads double jeopardy has the burden of proving abuse of [the court's] discretion." Oelke v. United States, 389 F.2d 668, 671 (9th Cir. 1967), cert. denied 390 U.S. 1029, 88 S.Ct. 1421, 20 L.Ed.2d 286 (1968). See also Tolan v. United States, supra; Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); Brewster v. Swope, 180 F.2d 984 (9th Cir. 1950). Petitioner clearly has failed to establish such an abuse of discretion. Instead, he seeks to have this court ignore the long line of decisions, cited supra, which are based upon the fountainhead decision of Perez, and to establish a new, strict, mechanical formula by which to judge the propriety of declaring a mistrial. The courts have steadfastly

rejected such a proposition. Petitioner states that "United States v. Jorn, supra, represents the latest in a line of cases which has the practical effect of narrowing the discretion of the trial judge to declare a mistrial." (Petition for Writ, at 15). Petitioner also cites Downum and Gori in support of this proposition. Respondent totally rejects the contention that the Supreme Court has been conducting a "narrowing" process with regard to Perez. Indeed, this court answered such contentions recently in Illinois v. Somerville, supra:

> In Downum, the court held, as respondent argues, that jeopardy "attached" when the first jury was selected and sworn. But in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather

than ends, the inquiry. . . That, indeed, was precisely the rationale of Perez and subsequent cases. Only if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by "manifest necessity" or the "ends of public justice." 410 U.S. at 467-468, 93 S.Ct. at 1072, 35 L.Ed.2d at 433.

This court further stated in Illinois v. Somerville, supra, that:

Given the established standard of discretion set forth in Perez, Gori, and Hunter, we cannot say that the declaration of a mistrial was not required by "manifest necessity" and the "ends of public justice."

Our decision in Jorn * * * does not support the opposite conclusion. While it is possible to excuse various portions of the plurality opinion * * * divorcing the language from the facts of the case serves only to distort its holdings. * * *The court's opinion in Jorn is replete with

> approving references to Wade v. Hunter. * * * 410 U.S. at 469, 93 S.Ct. at 1073, 35 L.Ed.2d at 434.

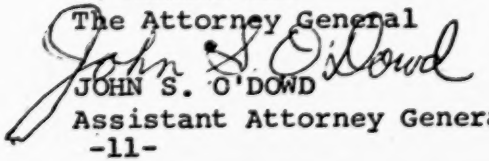
Clearly, this court has not retreated from Perez in either Downum, Gori, Hunter, Jorn or Somerville. Petitioner's arguments to the contrary are without merit.

CONCLUSION

The factual record clearly shows that the Arizona trial court properly exercised its discretion in ordering a mistrial upon ascertaining that Petitioner's first jury was hung. Therefore, Petitioner's incarceration in the Arizona State Prison is lawful and this petition for writ of certiorari should be denied.

Respectfully submitted,

N. WARNER LEE
The Attorney General



JOHN S. O'DOWD
Assistant Attorney General